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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 02 2009
SRC-08-009-58554

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a hand carver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is $30.10 per hour ($62,608.00 per year). The Form ETA 750 states that the position requires three years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka*

*v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, counsel submits a brief, copies of the petitioner's monthly bank account statements from 2001 through the first half of 2008, and copies of the petitioner's quarterly tax filing reports for 2001 through the first quarter of 2008. Other relevant evidence in the record includes copies of the petitioner's Form 1120 U.S Corporation Income Tax Returns for the years 2001 through 2007; a copy of the form W-2 Wage and Tax Statement issued by the petitioner to the beneficiary in 2001; and a letter dated May 2, 2008 from the petitioner's accountant [redacted] The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-140 petition the petitioner claimed to have been established on February 1, 1997 and to currently have 4 employees. The petitioner listed its gross annual income as $900,582.33 and its net annual income as $65,773.97. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage based on the "totality of the circumstances." Specifically, counsel states that petitioner's ability to pay is demonstrated by its gross receipts from 2001 through 2007, its bank balances from 2001 to 2008, and the wages paid by petitioner from 2008 through 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted a copy of a Form W-2 Wage and Tax Statement issued to the beneficiary in 2001. This document shows that the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner paid the beneficiary $25,792.00 in 2001. As this is a partial payment of the proffered wage, the petitioner must establish that it was able to pay the difference between the proffered wage and the wage actually paid in 2001. Since the proffered wage is $62,608.00 per year, the difference between the proffered wage and the wage actually paid in 2001 is $36,816.00. There is no evidence of wages paid to the beneficiary in later years. Therefore, the petitioner must establish that it was able to pay the full proffered wage from 2002 to 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 through 2007 as shown in the table below.

- In 2001, the Form 1120 stated net income of $5,756.00.
- In 2002, the Form 1120 stated net income of $9,510.00.
- In 2003, the Form 1120 stated net income of $643.00.
- In 2004, the Form 1120 stated net income of -$82.00.
- In 2005, the Form 1120 stated net income of $0.
- In 2006, the Form 1120 stated net income of $13,548.00.
- In 2007, the Form 1120 stated net income of $0.

The petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2001. The petitioner did not have sufficient income to pay the full proffered wage of $62,608.00 in 2002, 2003, 2004, 2005, 2006 or 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2001 through 2007 as shown in the table below.

[2]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, the Form 1120 stated net current assets of - $7,353.00.
- In 2002, the Form 1120 stated net current assets of $2,635.00.
- In 2003, the Form 1120 stated net current assets of - $34,920.00.
- In 2004, the Form 1120 stated net current assets of - $5,437.00.
- In 2005, the Form 1120 stated net current assets of - $6,953.00.
- In 2006, the Form 1120 stated net current assets of $1,448.00.
- In 2007, the Form 1120 stated net current assets of - $152.00.

The petitioner did not have sufficient net current assets in 2001 to pay the difference between the proffered wage and wages actually paid to the beneficiary. The petitioner did not have sufficient net current assets in the years 2002 through 2007 to pay the proffered wage.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage from 2001 through 2007 through wages paid to the beneficiary, net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the petitioner has established its ability to pay the proffered wage based on the "totality of the circumstances." Specifically, counsel relies on the petitioner's gross receipts, a letter from the petitioner's accountant, the petitioner's bank account balances, and the gross wages paid by the petitioner. With respect to the petitioner's gross receipts, counsel notes that gross receipts averaged nearly $1,000,000 per year from 2001 to 2007, "evidencing a steady, constant income earning and profitable construction business over a substantial period of time." However, as discussed above, USCIS examines a petitioner's net income, not gross receipts, in determining whether a petitioner had the ability to pay the proffered wage. In the instant case, the petitioner did not have sufficient net income in any relevant year to pay the proffered wage.

Counsel also states that the "strength and viability of petitioner's business" was demonstrated by the letter from the petitioner's accountant. The letter, dated May 2, 2008, simply states that "[the petitioner's] current financial status indicates the company is solvent and that they are capable of paying the proffered wage." There is no explanation or documentary evidence demonstrating how the petitioner's accountant reached this conclusion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel further states that the petitioner's monthly bank statements from 2001 through 2008 show that the petitioner had sufficient resources to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the

sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Finally, counsel states that the petitioner's ability to pay the proffered wage is supported by the petitioner's quarterly federal tax filing reports. Although these reports show the total wages paid by the petitioner for the years 2001 through 2007 as well as the first quarter of 2008, they do not establish the petitioner's ability to pay the proffered wage. In general, wages already paid to others are not available to prove the ability to pay the wage offered to the beneficiary at the priority date of the petition and continuing to the present.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.